No. 778.

IN THE

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

J. G. ENGLISH, AND
J. C. ENGLISH,
*Plaintiffs in Error.*

*VS.*

THE UNITED STATES,
*Defendant in Error.*

FEBRUARY TERM, 1902.

## BRIEF OF PLAINTIFFS IN ERROR.

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## STATEMENT.

This is an action by the United States to recover for the the value of cord wood cut upon government land by plaintiffs in error and used by them in this State. Issues were formed, the case was tried without a jury and judgment rendered for the value of the wood.

Although it is alleged in the complaint that plaintiffs in error cut the wood "with intent to dispose of the same" (Rec-

ord, p. 6), it is also alleged that they took it to their smelter at Sumpter, Oregon, where they used it themselves (Record, pp. 6 and 7). The lower court declares in its opinion that "The wood was used by defendants in their quartz mill at what is known as the Golconda mine in Eastern Oregon" (Record, pp. 32 and 33), and that "the timber in this case was not cut for export or sale" (Record, p. 36). It is therefore both alleged in the complaint and established by the evidence, as declared by the Court, that this wood was cut by plaintiffs in error for their own use in this State and that it was so used.

## SPECIFICATION OF ERRORS.

The complaint does not state facts sufficient to constitute a cause of action.

The wood was cut and used by plaintiffs in error, within this State, and was not cut with intent to export or dispose of the same and therefore the judgment is erroneous.

## ARGUMENT.

Our contention that the complaint does not state facts sufficient to constitute a cause of action and that upon the established and undisputed facts the defendant in error is not entitled to recover is predicated upon the proposition that plaintiffs in error are not liable because the wood was not cut with intent to export or dispose of the same.

Section 4 of the act of June 3, 1878, entitled "An Act for the sale of timber lands in the States of California, Oregon, Nevada and Washington Territory" (20 Stat. at L. 89), provides that "it shall be unlawful to cut, or cause to procure to be cut * * * any timber growing on lands of the United States * * * or remove, or cause to be removed any timber from said public lands with intent to export or dispose of the same."

Under that act it is evident that Congress intended that in

all cases wherever timber was illegally cut upon public land the party so cutting should be subject to a criminal prosecution. It is equally evident that Congress did not intend that any parties cutting timber upon public land should be subject to a prosecution in a civil action, unless such party was guilty of a violation of the statute, and subject to a criminal prosecution. There is nothing in the act to indicate an intention on the part of Congress to make certain things in reference to the cutting of timber criminal, and to make other things which are not criminal under the act, the basis of an action by the government to recover the value of timber. If Congress had intended this it would have used some apt words to show such intention. The evident intention, as expressed by the act is, that wherever there has been a violation of the statute the government has the right to prosecute either a civil or a criminal action, or both, in its discretion.

In U. S. v. Hacker, 73 Fed. 292, it was held that the words "with intent to export or dispose of the same" applied to the cutting as well as to the removal of timber from the public lands and that there was no criminal liability in cutting the timber unless that intent existed. The same construction of that act is adopted in U. S. v. Pierce Trading Co., 109 Fed. Rep. 239, 247. In that case, this question was not directly involved, but in construing this act in connection with another passed on the same day, the Court emphasizes the fact that the cutting of the timber must have been done with intent to export or dispose of the same.

The decision appealed from recognizes this law as stated to be correct, but attempts to reason from the statute, that while the defendants have not committed a crime under the statute, yet they are subject to the payment of damages for the doing of the act complained of. In other words, that the stat-

ute is broad enough to make them subject to prosecution in a civil action, while under the same facts it is not broad enough to make them subject to a criminal prosecution. This reasoning, we think, is erroneous, because it is evident from the statute that Congress intended to authorize certain things to be done with reference to the public timber, and to prohibit the doing of all other things, and to punish a party doing the prohibited act, either civilly or criminally, ur both, and under this act, no person is liable civilly, unless under the same evidence he would be liable to a criminal prosecution. Evidently the doing of anything prohibited by that statute is wrongful, and may be the basis of a criminal prosecution, and it is equally evident that whatever is not prohibited by the statute may be rightfully done, and can neither be the basis of a criminal prosecution nor of an action of a civil nature. The statute was plainly intended to cover every case arising in California, Oregon and Washington Territory relating to the cutting of timber upon the public lands by anybody and everybody, regardless of whether the cutting was rightful or wrongful. To give to the statute any other construction is to legislate by judicial decision into the statute a provision not there, rather than to interpret the statute according to its self-evident and plain meaning.

Section 4 of the statute above quoted concludes with a proviso "that nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or from taking the timber necessary to support his improvements," and this is a limitation upon the effect of the statute, because it enlarges the rights of the miner and the agriculturist. If under the statute, without this provision, the miner and the agriculturist had a right to cut and remove timber, the provision is of no effect; if, however, the

right was doubtful, the provision of the statute confirmed and declared that right. In either event, either one has a lawful right to do what is not prohibited by the statute.

It is very evident from the legislation of Congress during the entire history of mining, that it was the settled policy of the government to promote mining as a legitimate and favored industry. The right to mine and take gold from the public lands, in the absence of legislation by Congress, while, strictly speaking, is a trespass upon the rights of the government, was first sanctioned by custom, then recognized and protected by judicial decisions, and afterwards was confirmed by act of Congress. The right to the use of water in public streams by means of ditches across the public domain was of the same doubtful character, and received the same sanction in the same manner.

The first act of Congress, passed on June 3d, 1878, authorized all miners, citizens of the United States, and other persons *bona fide* residents of the States of Colorado or Nevada, or either of the territories therein named, and all other mineral districts of the United States, to fell and remove for building, agricultural, mining or other domestic purposes, any timber or other trees growing or being on the public lands mineral in character, not subject to entry except for mineral.

In the two cases of the United States v. Smith, 11 Fed. Rep. 487, and United States v. Benjamin, 21 Fed. 285, the Court held that outside of the states and territories actually mentioned in the act, there were no other mineral districts of the United States, and hence, that the act only applied to the states and territories specially mentioned in the act. Both of these cases were decided upon facts arising from the cutting, removal and sale by sawmill men of public timber—in neither case was any contention made that the cutting of timber was

done by miners for mining purposes, and in neither case was it necessary for the purposes of the decision for the Court to decide that there were no such districts outside of the state and territories mentioned.

In any event, on the same day another act—the one quoted from above—was passed by Congress which did authorize the use of timber by miners, and it is unreasonable to suppose that Congress intended to discriminate between the miners of California, Oregon, and the Territory of Washington, and those of the other mining states and territories, or that Congress intended to be more generous to the miners of one section than to those of the other. It is a matter of common knowledge, and it will be presumed to have been known by the officers and agents of the government, as well as by Congress itself, that prior to June 3d, 1878, the miners in Washington, Oregon and California had, from the earliest days of mining, used the timber upon public land for mining purposes in common with the miners of all of the other mining states and territories. It is also a matter within the common knowledge of every one, that since the passage of that act the miners of California, Oregon and Washington, without exception, have used the timber from public lands for mining purposes. It will be presumed that such use was known by the officers and agents of the government, as well as by Congress itself, and it may be honestly said that the government did have knowledge of such use, and did acquiesce in such use, from the passage of that act until the commencement of this action, because there is no record to our knowledge of any action, either civil or criminal, ever having been instituted by the government against any miner in Oregon, Washington or California for such use.

It is a matter of general knowledge, and we think within the judicial knowledge of the Court, that the United States

Surveyor-Generals of California, Oregon and Washington, in the performance of their duties relating to the surveys of the public domain, have in many instances returned as mineral certain portions of the public domain, on account of which, in the absence of evidence to the contrary that said lands are non-mineral, title could not be acquired under the timber and stone act, nor by any other means, except mineral entry. That being so, the act which appears first in the statute, under date of June 3d, 1878, ought to have been construed to apply to the mineral districts of the three Pacific Coast states. In any event, the fact that for nearly a quarter of a century the government, with the knowledge that the miners of Oregon, Washington and California were cutting and using the public timber for mining purposes, acquiesced in such use, we think shows conclusively that there was no doubt existing in the minds of Congress, or in any of the officers of the government, but that the miner was acting within his own right while so using the public timber.

The lower Court bases its decision entirely upon a construction of the statute. In considering the Hacker case and construing section 4 of the statute that Court, although evidently in much doubt, holds that, notwithstanding there is no criminal liability without the intent to sell or dispose of the timber, yet the defendants are liable for the value of the timber without that intent. If, however, it be contended that one who takes timber from government land is liable for its value independent of statutory provisions, then it must be conceded that any permissory proviso of the statute absolves from such liability. Any contention for general liability must be predicated upon the theory that the government has the same property rights in the public lands as pertains to individual ownership. That, as a general proposition, is technically true, and yet as applied to the relation of the government to the people

of whom it is composed, the fact that all the public lands are held in trust for the people, has always been a dominant factor in regulations governing the public domain.

The act under consideration provides that nothing contained therein "shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim or preparing his farm for tillage or from taking the timber necessary to support his improvements." If it be conceded that, independent of this statute, the government can recover from one who takes timber from the public lands, then the permission granted by the statute is all that protects the miner who takes timber for necessary support of his improvements, from an action for its value. And yet, strictly speaking, all that the letter of that statute does is to protect him from criminal prosecution. But in the true spirit of the relation between the government and the people respecting this property, the miner, upon authority of this statute, is permitted to use timber from the public lands. Exemption from the effect of this statute exonerates from civil liability. That is the spirit of this law and upon that theory alone are those, directly included in this proviso, protected. The purpose of the proviso is to exclude from the operation of the statute that which would otherwise be included. That, excluded, is thus without the operation of the statute, just the same as if it had never been included. That which never was included occupies the same relation to the statute as that expressly excepted. To include by general words and then except by special proviso adds nothing to that excepted. It is the same as if it had never been included. It follows, therefore, that since those within the proviso are exempt from civil liability because of *that* fact, those not included within the statute are exempt also. If, then, the plaintiffs in error did not cut this timber "with intent to export or dispose

of the same" and therefore are not subject to the penalties of this statute, they are not liable in this action, and the judgment should be reversed.

Respectfully submitted,

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